

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNEAPOLIS CITY COUNCIL

In the Matter of the Liquor License of
Pizza Luce', Inc.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-captioned matter came on for hearing before Administrative Law Judge George A. Beck commencing at 1:30 p.m. on November 15, 2001 at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing was held pursuant to a Notice of Hearing dated October 18, 2001. The parties agreed to reset the hearing date from November 1 to November 15, 2001. The record closed on November 15, 2001, at the conclusion of the hearing.

Henry Reimer, Assistant City Attorney, 333 South 7th Street, Suite 300, Minneapolis, Minnesota 55402-2453, appeared on behalf of the City of Minneapolis (City). Brian Liebo, Attorney at Law, Suite 560, 10400 Viking Drive, Eden Prairie, Minnesota, 55344, appeared on behalf of Pizza Luce', Inc. (Licensee).

NOTICE

This report is a recommendation and not a final decision. The Minneapolis City Council will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Pursuant to Minn. Stat. § 14.61, the final decision of the Minneapolis City Council shall not be made until this Report has been made available to the parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the City Council. The parties should contact the Minneapolis City Council to determine the procedure for filing exceptions or presenting argument before the City Council.

STATEMENT OF ISSUE

Whether one of the Licensee's employees served alcoholic beverages to an individual under the age of 21 years of age in violation of Minn. Stat. § 340A.503 (2000) and Minneapolis City Ordinance § 370.10, and if so, whether the Licensee's liquor license should be disciplined.

Based upon all the proceedings, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On March 31, 2000, Dallas Moeller, a law enforcement student at Metro State University, was working with Minneapolis Police Officer James F. Archer, who was assigned to the Community Response Team - Liquor Enforcement Division. Mr. Moeller was employed by the City of Minneapolis to act as a decoy to assist with alcohol sales compliance checks. He was 19 years of age as of March 31, 2000.

2. When acting as a decoy, Mr. Moeller was instructed by the Minneapolis Police Department to solicit the sale of an alcoholic beverage, to tell the truth when asked questions by establishments selling liquor, and to provide his normal driver's license if requested to produce identification by the establishment. His license states that his 21st birth date is January 15, 2002.¹ When entering a bar or restaurant, Dallas Moeller wore a wireless microphone that transmitted any conversation to a tape recorder in the vehicle outside the establishment.

3. On March 31, 2000 at approximately 6:10 p.m., Officer Archer entered Pizza Luce' and sat at a table 10 to 15 feet from the bar. Shortly thereafter, Dallas Moeller entered Pizza Luce' and proceeded to the bar. When a server approached, Mr. Moeller ordered a Budweiser beer. The server requested identification. Dallas Moeller produced his driver's license which indicates he is under the age of 21. The server reviewed the identification and returned the identification to Mr. Moeller. The server, the bar manager of Pizza Luce' delivered a Budweiser with the bottle cap removed to Dallas Moeller.² Mr. Moeller paid with a \$10.00 bill which had previously been provided to him by the Minneapolis Police Department as "buy" money. The bar manager delivered change to Mr. Moeller. Moeller then left the premises.

4. Officer Archer then approached the bar manager, identified himself and told her that Dallas Moeller was under the age of 21 and that he had witnessed him being served an alcoholic beverage. Officer Archer requested and received the identification of the server who was Shauna Lausham, bar manager, an employee of the Licensee. Officer Archer and another officer (who had been waiting in the police vehicle) then informed Samantha Dixon, the shift manager, of the failure to pass the compliance check. Ms. Dixon asked to see the identification of the decoy, Dallas Moeller. The identification was not produced for Ms. Dixon by the officers because Moeller had left the bar.

¹ Exhibit 1.

² Exhibit 3.

5. Joseph Baier, the majority owner of Pizza Luce', Inc., requested a copy of the identification of Dallas Moeller from the Liquor Division of the City of Minneapolis approximately one week later. He was informed by Sargent Tim Heppner of the Liquor Division that he could examine it at City Hall. However, when Mr. Baier arrived, Officer Heppner was not present, and he was told that the identification could not be reviewed at that time. Joseph Baier did not return to review the identification at a later date.

6. The Licensee stipulated that beer was purchased by the minor patron, money was received from the patron, and the money was placed into the cash register at Pizza Luce', Inc. on March 31, 2000.

Based upon the foregoing Findings of Fact, the Administrative Law Judges makes the following:

CONCLUSIONS

1. The Minneapolis City Council and the Administrative Law Judge have authority to consider the charges brought against the Licensee pursuant to Minn. Stat. §§ 14.55 and 340A.415 and § 362.340 of the Minneapolis Code of Ordinances.

2. The Licensee received timely and appropriate notice of the charges against it and of the time and place of the hearing.

3. The City has complied with all relevant substantive and procedural requirements of statute and rule.

4. Pursuant to Minn. Stat. § 340A.503, subd. 2(1), it is unlawful for any person "to sell, barter, furnish, or give alcoholic beverages to a person under 21 years of age."

5. Under Minneapolis Ordinance § 370.10, no person licensed by the city or a licensee's employee shall "serve or dispense upon the licensed premises any liquor or beer to any person under the age of twenty-one (21) years."

6. If a licensee fails to comply with an applicable statute or ordinance, the City may take disciplinary action against the license and impose a civil penalty pursuant to Minn. Stat. § 340A.415 and Minneapolis Ordinance § 362.340.

7. The City has the burden of proof to establish, by a preponderance of the evidence, that the Licensee violated the statute and ordinance cited by serving alcoholic beverages to a person under the age of 21 years.

8. The City has established by a preponderance of the evidence that the Licensee, Pizza Luce', Inc. violated the statute and ordinance by selling and serving an alcoholic beverage to an individual under the age of 21 years.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Minneapolis City Council take disciplinary action against the liquor license of Pizza Luce', Inc.



Dated at Minneapolis, Minnesota
this 12th day of December, 2001.

GEORGE A BECK
Administrative Law Judge

612/341-7601

Recorded: One tape-no transcript prepared.

MEMORANDUM

The City of Minneapolis has charged the licensee with serving alcoholic beverages to an individual under the age of 21 years in violation of Minn. Stat. § 340A.503, subd. 2(1) and Minneapolis Ordinance § 370.10. Minn. Stat. § 340A.503, subd. 2(1) provides that it is unlawful for any person "to sell, barter, furnish or give alcoholic beverages to a person under 21 years of age." The Minneapolis City Ordinance § 370.10 prohibits persons licensed by the city or their employees from serving or dispensing liquor or beer to any person under the age of 21 years.

The City proved that Pizza Luce' served alcohol to an individual under the age of 21 in violation of both the statute and the ordinance. Dallas Moeller, working as a decoy for the police department, entered Pizza Luce' on March 31, 2000. A server, the bar manager, asked the decoy for his order. Dallas Moeller ordered a Budweiser and the bar manager asked to see his identification.

After reviewing the driver's license, the bar manager returned the identification to Mr. Moeller. An opened bottle of Budweiser was served to Dallas Moeller by the bar manager. Payment was accepted and after his change was received, Mr. Moeller left the premises. Officer Archer then spoke to the bar manager and explained that Pizza Luce' had failed the compliance check.

Dallas Moeller testified that as part of his training as a decoy for the City of Minneapolis, he was directed to tell the truth in response to any questions asked by the establishment and to produce his valid Minnesota driver's license which clearly reveals his age as under 21. The evidence establishes by a preponderance that Dallas Moeller produced his regular driver's license to the server at Pizza Luce'.

The Licensee contends that the identification is suspect because on two occasions the licensee requested and was denied review of the driver's license. The licensee argued that Officer Archer had refused to provide access to the identification of Dallas Moeller on March 31, 2000. The record does not support a finding that Officer Archer refused to allow the shift manager to see the identification. Dallas Moeller had already vacated the premises and the identification was no longer available at the time.

When the owner requested to view the identification at the Police Department, he was informed that Sargent Heppner was not present and the identification could not be reviewed at that time. The licensee was not denied access to the identification but rather needed to comply with the necessary procedural requirements to review the document. The licensee did not later attempt to view the identification.

The Licensee further claimed that the search of the premises was performed without a warrant and without probable cause in violation of the Fourth Amendment. In Colonnade Catering Corp. v. United States, 397 U.W. 72 (1970), the Supreme Court held that "Congress could statutorily authorize a warrantless search of a liquor licensee's premises." In United States v. Biswell, 406 U.S. 311 (1972), the Court held that a business licensed as a gun dealer in compliance with the federal Gun Control Act were "pervasively regulated" and "long subject to close supervision and inspection." The rationale behind both of the above cases is that businesses involving close government regulation must be fully aware that inspections are likely and that consent to the inspection is implied.

It must be first noted that this business invites the public onto its premises and arguably no warrant is required to enter. If there is doubt about the question, however, in order to determine whether an agency can engage in a warrantless search of business premises, "it is necessary to examine the statute or regulatory scheme by which the search is conducted and determine whether the method of regulation makes a warrant unnecessary." Donovan v. Dewey, 452 U.S. 594 (1981). The Supreme Court in Donovan determined that "it is the pervasiveness and regularity . . . that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment." The court must examine the nature and purpose of an administrative program to determine whether the search is reasonable and whether implied consent might be found.

Chapter 340A of Minnesota Statutes sets out a detailed system of regulation of the sale of liquor. Minn. Stat. § 340A.415 provides for suspension, revocation of the license, or a civil penalty for failure to comply with an applicable statute relating to alcoholic beverages. The City of Minneapolis Ordinance 370.10, provides that no person licensed under Chapter 362, 363, or 366 or "such licensee's agent or employees, shall serve or dispense upon the licensed premises any liquor or beer to any person under the age of twenty-one (21) years; nor shall such licensee, or the licensee's agent or employee, permit any person under the age of twenty-one (21) years to be furnished with any liquor or beer on the licensed premises." Minnesota Statutes and the City of Minneapolis Code of Ordinances provide a sufficiently pervasive regulatory scheme so as to imply consent of the license holder for a warrantless search to investigate compliance with the applicable statutes and codes.

The Licensee also questioned, without citing authority, whether the use of a wireless microphone to record a conversation violates the Fifth Amendment. As the City points out, however, only one person needs to consent to the recording of a conversation in Minnesota. At any rate, this decision relies upon the testimony of witnesses because the tape recording of the conversations is not very clear.

The Licensee also alleged due process was violated by the hearing being held after an unreasonable delay which allegedly resulted in the failure to locate a necessary witness. The delay has resulted in prejudice, the licensee argues, and should result in dismissal.

The basic query is "whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for." Fetsch v. Holm, 236 Minn. 163, 52 N.W.2d 113, 115 (1952). The purpose of the doctrine is to "prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." Aronovitch v. Levy, 238 Minn. 237, 242, 56 N.W.2d 570, 574 (1953). Evidence of prejudice is an important factor in determining whether the petitioner's delay is reasonable. Wheeler v. City of Wayzata, 533 N.W.2d 405, 409 (Minn. 1996), *citing*, Aronovitch, *supra*, at 56 N.W.2d at 574.

The Licensee produced no evidence on the number or quality of the attempts made to locate the bar manager in order to obtain her testimony at the hearing. No other evidence of prejudice was alleged nor proven at the hearing. The one and one half years subsequent to the violation until the hearing is not per se an unreasonable delay and the licensee has failed to produce evidence of prejudice which would create an inequity in disciplining the license holder. Generally, there is no statute of limitations in administrative license cases and laches will seldom be found unless the licensee has been unduly prejudiced. In Re N.P., 361 N.W.2d 386 (Minn. 1985).

The Licensee also alleged that the bar manager reasonably relied upon proof of acceptable age in serving Dallas Moeller an alcoholic beverage on March 31, 2000. Pursuant to § 340A.503, subd. 6.(b) "it is a defense for the defendant to prove by a preponderance of the evidence that the defendant reasonably and in good faith relied upon representations of proof of age . . . in selling, bartering, furnishing, or giving the alcoholic beverage." The evidence presented at hearing fails to prove by a preponderance that the bar manager affirmatively relied in good faith upon representations of proof of age greater than the age of 21. The testimony of Dallas Moeller that he produced his regular driver's license revealing his age to be less than 21 years was credible.

G.A.B.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
100 WASHINGTON SQUARE, SUITE 1700
MINNEAPOLIS, MN 55401

CERTIFICATE OF SERVICE

Case Title: In the Matter of the Liquor
License of Pizza Luce', Inc.

OAH Docket No. 1-6010-14511-6

Mary Osborn, certifies that on the 12th day of December, 2001, she served a true and correct copy of the attached Findings of Fact, Conclusions and Recommendation; by placing it in the United States mail with postage prepaid, addressed to the following individuals:

Minneapolis City Clerk
304 City Hall
350 South Fifth Street
Minneapolis, Minnesota 55415

Henry Reimer
Assistant City Attorney
333 South Seventh Street, Suite 300
Minneapolis, Minnesota 55402-2453

Brian Liebo
Attorney at Law
10400 Viking Drive, Suite 560
Eden Prairie, Minnesota 55344